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## Fulfilling Daubert's Gatekeeping Mandate Through Court-Appointed Experts

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# FULFILLING *DAUBERT*'S GATEKEEPING MANDATE THROUGH COURT-APPOINTED EXPERTS<sup>†</sup>

THE HONORABLE STEPHANIE DOMITROVICH, PH.D.\*

"The idea of expert witness[es] who are not beholden to the parties who can provide information to judges and juries on technical issues, I think is a terrific opportunity worth exploring." - Judge Richard A. Posner, Seventh Circuit of the U.S. Court of Appeals<sup>1</sup>

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<sup>1</sup> Debra Cassens Weiss, *Judge Posner, Presiding at Patent Trial, Will Use Court-Appointed Experts to Explain Terms*, ABA JOURNAL (May 14, 2012, 10:30 AM), [http://www.abajournal.com/news/article/posner\\_presiding\\_at\\_patent\\_trial\\_will\\_use\\_court-appointed\\_experts\\_to\\_explain/](http://www.abajournal.com/news/article/posner_presiding_at_patent_trial_will_use_court-appointed_experts_to_explain/) (quoting speech to the 7th Circuit Bar Association on May 7, 2012).

## INTRODUCTION

Experts play an increasingly important role in the trial process.<sup>2</sup> The average civil trial includes approximately 3.7 to 4.1 experts<sup>3</sup> and in general, the testimony that experts provide at trial is influential.<sup>4</sup> Juries find experts to be credible and report being influenced by the expert testimony they hear.<sup>5</sup> At the same time, there is a growing trend that when parties in a lawsuit hire experts, juries perceive the experts' cloaks of objectivity as weakened or non-existent.<sup>6</sup> Put another way, experts lose credibility in the eyes of the jurors "when experts are too much of an advocate for a party."<sup>7</sup> Rather than viewing experts as objective suppliers of truthful information—information that is beyond the ken of the average juror—many jurors view experts as "hired guns" willing to say whatever the party paying them wants them to say if the compensation is enough.<sup>8</sup> Fair or not, such a perception damages the justice system because it feeds into the view that verdicts can be bought by those with the largest purse strings. This paper will encourage judges to exercise their inherent authority to appoint experts. Federal Rule of Evidence (F.R.E.) 706 provides for court-appointed experts to assist judges in their gatekeeping role of admitting only reliable expert testimony for the jury to weigh in deliberation.<sup>9</sup>

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<sup>2</sup> JANET COTTERILL, *LANGUAGE AND POWER IN COURT: A LINGUISTIC ANALYSIS OF THE O.J. SIMPSON TRIAL* 156 (2003).

<sup>3</sup> NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 174 (2007).

<sup>4</sup> See COTTERILL, *supra* note 2.

<sup>5</sup> See generally Joseph M. Hanna, *Influence Your Verdict by Changing Jurors' Perceptions of Expert Witnesses, Part Two*, SECTION OF LITIGATION, MINORITY TRIAL LAWYER, AMERICAN BAR ASSOCIATION (December 14, 2011), <http://apps.americanbar.org/litigation/committees/minority/articles/fall2011-juror-perception-witness-2.html>.

<sup>6</sup> *Id.* ("[J]urors rejected experts who seemed to be 'hired guns.' Thirty-five percent of the juror respondents stated that payment of the expert by the lawyers meant that the expert could not be trusted to be unbiased.").

<sup>7</sup> Jan Mills Spaeth & Rosalind Greene, *From the Mouths of Jurors: 10 Things Jurors Don't Like About Expert Witnesses*, ARIZONA ATTORNEY, Mar. 2016, [http://www.adjuryresearch.com/pdf\\_docs/pubs\\_recent/0316MouthsofJurors.pdf](http://www.adjuryresearch.com/pdf_docs/pubs_recent/0316MouthsofJurors.pdf).

<sup>8</sup> Molly Treadway Johnson et al., *Expert Testimony in Federal Civil Trials, A Preliminary Analysis*, FED. JUD. CENTER 1, 5 (2000); see also Douglas Mossman, "Hired Guns," "Whores," and "Prostitutes": *Case Law References to Clinicians of Ill Repute*, 27 J. AM. ACAD. PSYCHIATRY 414, 414–15 (1999).

<sup>9</sup> FED. R. EVID. 706; Daniel S. Fridman & J. Scott Janoe, *Procedural Issues Surrounding Judicial Gatekeeping*, THE JUDICIAL GATEKEEPING PROJECT, <https://cyber.harvard.edu/daubert/ch8.htm> (last visited Sep. 19, 2016) ("The [*Daubert*] decision suggested that a judge could utilize an expert to assist her in the gatekeeping task of evaluating the complicated scientific methodologies of each party's experts. These court-appointed experts take two basic forms: a formal expert witness or an informal technical advisor. To understand the differences between them, we must first determine which of two main sources of authority

In a trilogy of United States Supreme Court cases beginning in 1993 with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>10</sup> the Court has specifically entrusted trial judges with the role of gatekeepers of expert testimony to ensure that unreliable evidence is kept away from jurors.<sup>11</sup> The Supreme Court in *Kumho Tire Company, Ltd. v. Patrick Carmichael*<sup>12</sup> “conclude[d] that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.”<sup>13</sup> The *Kumho* Court further held that “[t]he objective . . . is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”<sup>14</sup> The Court went on to say: “[a]nd whether the specific expert testimony focuses upon specialized observations, the specialized translation of those observations into theory, a specialized theory itself, or the application of such a theory in a particular case, the expert’s testimony often will rest ‘upon an experience confessedly foreign in kind to [the jury’s] own.’”<sup>15</sup> The trial judge is expected to ensure that both scientific and technological testimony is reliable and relevant to assist the jury in evaluating “whether the testimony reflects scientific, technical, or other specialized knowledge.”<sup>16</sup> The *Kumho* Court asserted, “[i]n sum, Rule 702 grants the district judge the discretionary authority, reviewable for its abuse, to determine reliability in light of the particular facts and circumstances of the particular case.”<sup>17</sup>

In *General Electric Co. v. Joiner*,<sup>18</sup> the Supreme Court noted that the Federal Rules of Evidence left “in place the ‘gatekeeper’ role of the trial

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the judge can use to appoint the expert. Rule 706 of the Federal Rules of Evidence outlines the full set of formal procedures for using a court-appointed expert witness.”).

<sup>10</sup> 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999).

<sup>11</sup> *Daubert*, 509 U.S. at 597; see also Fridman & Janoe, *supra* note 9 (“The Supreme Court in [*Daubert*] expressed its confidence that judges possess the capacity to undertake the review of expert scientific testimony. It also indicated that they could use neutral experts such as scientists to help them perform their task.”).

<sup>12</sup> 526 U.S. 137 (1999).

<sup>13</sup> *Id.* at 152.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 149 (quoting Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 54 (1901)).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 158.

<sup>18</sup> 522 U.S. 136 (1997).

judge in screening such evidence.”<sup>19</sup> In their gatekeeping role, trial judges are expected to assess the relevance and reliability of proffered expert evidence and reject specious or junk science to prevent confusion of juries.<sup>20</sup> This evaluation process requires judges to understand various scientific and technical principles. However, the “current practice and training of the judiciary may not sufficiently prepare [judges] to perform the role of scientific evaluator.”<sup>21</sup> Expert testimony by forensic scientists can be both highly technical and highly persuasive.

On the one hand, judges have admitted forensic science testimony for decades in such areas as fingerprinting, handwriting, bite marks, and other domains, both before and after the judicial gatekeeping responsibility was established in *Daubert*.<sup>22</sup> One might argue then that judges need not reinvent the wheel in each case where a *Daubert* objection is raised to some item of forensic science evidence because courts have considered the scientific merits of this type of evidence many times before. On the other hand, academicians outside of forensic science have pointed to a pervasive “lack of standards, research, and established error rates” in the forensic sciences.<sup>23</sup> These and other concerns are detailed in a 2009 National Academy of Sciences (NAS) report on the state of non-DNA forensic sciences entitled “Strengthening Forensic Science in the United States: A Path Forward” (NAS Report).<sup>24</sup>

The NAS Report suggests that many assumptions and foundational principles in the forensic sciences have not yet been sufficiently demonstrated to be reliable.<sup>25</sup> The NAS committee found that “although

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<sup>19</sup> *Id.* at 142.

<sup>20</sup> *Id.*; see also Fridman & Janoe, *supra* note 9 (noting that most courts require parties seeking to exclude particular expert testimony to do so by motion, though some trial courts have interpreted *Daubert* to require review of expert testimony *sua sponte*).

<sup>21</sup> SHIRLEY A. DOBBIN ET AL., STATE JUST. INST., A JUDGE’S DESKBOOK ON THE BASIC PHILOSOPHIES AND METHODS OF SCIENCE 2 (1999).

<sup>22</sup> Michael J. Saks, *Protecting Factfinders From Being Overly Misled, While Still Admitting Weakly Supported Forensic Science Into Evidence*, 43 TULSA L. REV. 609 (2007).

<sup>23</sup> Jane Campbell Moriarty, *Will History Be Servitude?: The NAS Report on Forensic Science and the Role of the Judiciary*, 2010 UTAH L. REV. 299, 300 (2010); see also Jonathan J. Koehler & Michael J. Saks, *Individualization Claims in Forensic Science: Still Unwarranted*, 75 BROOK. L. REV. 1187 (2010) (arguing that “no scientific basis exists for the proposition that forensic scientists can ‘individualize’ an unknown marking (such as fingerprint, tire track, or handwriting sample) to a particular person or object to the exclusion of all others in the world”); Michael J. Saks & Jonathan J. Koehler, *The Individualization Fallacy in Forensic Science Evidence*, 61 VAND. L. REV. 199 (2008).

<sup>24</sup> NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009) [hereinafter NAS REPORT].

<sup>25</sup> *Id.* at 7–8; see also Judge Harry T. Edwards, Presentation at the Superior Court of the

there are many dedicated and skilled forensic professionals, the quality of practice in the forensic disciplines varies widely and the conclusions reached by forensic practitioners are not always reliable.”<sup>26</sup> Specifically, judges and lawyers reviewing this NAS Report will hopefully realize that the vast amount of improvement needed in the forensic science disciplines with regard to establishing and testing techniques and methodologies used “is neither pro-defense nor pro-prosecution; it is, rather, both pro-science and pro-justice.”<sup>27</sup>

Most recently, the President’s Council of Advisors on Science and Technology (PCAST) issued a report in September 2016 following the lead of the NAS Report, which unveiled its study’s results on additional steps needed to ensure the validity of forensic science in the United States.<sup>28</sup> PCAST, in its letter to the President of the United States, “aimed to help close these gaps for a number of forensic ‘feature-comparison’ methods—specifically, methods for comparing DNA samples, bitemarks, latent fingerprints, firearm marks, footwear, and hair.”<sup>29</sup> PCAST found that two

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District of Columbia Conference on The Role of the Court in An Age of Developing Science & Technology: The National Academy of Sciences Report on Forensic Science – What it Means for the Bench and Bar (May 6, 2010), <https://www.fd.org/docs/select-topics/evidence/forensic-evidence/the-national-academy-of-sciences-report-on-forensic-sciences-what-it-means-for-the-bench-and-bar.pdf?sfvrsn=4> (“Carol Henderson, Past President of the American Academy of Forensic Sciences, said: ‘The report identified shortcomings in research, education, and standards of practice in the nation’s crime labs. In-depth research and analysis of options leading to strategic policy and implementation plans is needed . . . . We have been presented with an opportunity to make forensic science serve justice even more reliably and effectively. This is the time to build better ‘forensic science.’”); Jules Epstein, *The NAS Report: An Evidence Professor’s Perspective*, IT’S EVIDENT (July 2009), <http://www.ncstl.org/evident/July,%202009%20Epstein%20SPOTLIGHT> (“Nonetheless, the [NAS] Report’s findings call into question the degree of certainty testified to by practitioners of ‘soft’ forensic disciplines, the subjective pattern matching of fingerprints, ballistics, handwriting, tool marks, and tire and shoe print treads. In particular, the [NAS] Report found an across-the-board inability to validate claims that a correspondence of features between crime scene evidence and a known (e.g., between a latent print left at a burglary and the print of a suspect) proves that the suspect was the sole possible contributor.”).

<sup>26</sup> Edwards, *supra* note 25, at 2.

<sup>27</sup> Harry T. Edwards & Jennifer L. Mnookin, *A Wake-up Call on the Junk Science Infesting Our Courtrooms*, WASH. POST, Sept. 20, 2016, [https://www.washingtonpost.com/opinions/a-wake-up-call-on-the-junk-science-infesting-our-courtrooms/2016/09/19/85b6eb22-7e90-11e6-8d13-d7c704ef9fd9\\_story.html?hpid=hp\\_no-name\\_opinion-card-a%3Ahomepage%2Fstory&utm\\_term=.e8947b67fecf](https://www.washingtonpost.com/opinions/a-wake-up-call-on-the-junk-science-infesting-our-courtrooms/2016/09/19/85b6eb22-7e90-11e6-8d13-d7c704ef9fd9_story.html?hpid=hp_no-name_opinion-card-a%3Ahomepage%2Fstory&utm_term=.e8947b67fecf).

<sup>28</sup> See generally PRESIDENT’S COUNCIL OF ADVISORS ON SCI. & TECH., EXEC. OFFICE OF THE PRESIDENT, REPORT TO THE PRESIDENT, FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS (2016) [hereinafter PCAST REPORT].

<sup>29</sup> *Id.* at x.

important gaps exist regarding the validity of forensic sciences in the United States' legal system: "(1) the need for clarity about the scientific standards for the validity and reliability of forensic methods and (2) the need to evaluate specific forensic methods to determine whether they have been scientifically established to be valid and reliable."<sup>30</sup>

Senior Judge Harry Edwards of the U.S. Court of Appeals for the D.C. Circuit and Jennifer Mnookin, Dean of UCLA School of Law, opine that the PCAST Report "persuasively explains that expert evidence based on a number of forensic methods—such as bite mark analysis, firearms identification, footwear analysis and microscopic hair comparisons—lacks adequate scientific validation."<sup>31</sup> These scholars support PCAST's "plausible, workable test for validity" which entails members of the forensic disciplines conducting empirical testing for error rates and accuracy as to conditions existing in "the real world."<sup>32</sup>

Forensic science practitioners will benefit from the results of such legitimate studies. They will gain a better understanding of "what they do not know about the limits of their disciplines, and it will cause them to be more forthright in explaining these limits to judges and jurors."<sup>33</sup> By making strides in validity and reliability, the forensic science disciplines will eliminate the wide variability in "reliability, error rates, reporting, research foundations, general acceptability, and published material."<sup>34</sup> Both of these reports aim to make judges and lawyers aware that the levels of scientific development and evaluation vary substantially among forensic science disciplines.<sup>35</sup> While the solution of a "long-term research agenda will require a thorough assessment of each of the assumptions that underlie forensic science techniques," forensic practitioners "presented with a standardized set of realistic training materials that vary in complexity" can begin to address these concerns immediately.<sup>36</sup> Although the NAS Report stops short of recommending a moratorium on the admissibility of forensic science evidence, criminal defense attorneys and others have used the report to argue for the exclusion of all such evidence through motions *in limine* prior to trial and the use of post-conviction relief petitions to overturn

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<sup>30</sup> *Id.*

<sup>31</sup> Edwards & Mnookin, *supra* note 27, at 1.

<sup>32</sup> *Id.* at 3.

<sup>33</sup> *Id.*

<sup>34</sup> NAS REPORT, *supra* note 24, at 188; Edwards, *supra* note 25, at 12 ("Hopefully, better scientific research, mandatory accreditation and certification, uniform standards, better practices, and national oversight will cure issues of this sort.").

<sup>35</sup> NAS REPORT, *supra* note 24, at 188.

<sup>36</sup> *Id.* at 189.

convictions in situations where the evidence is not excluded. Judges have referenced the NAS Report in court opinions.<sup>37</sup> At the same time, trial judges who consider challenges to scientific evidence will likely hear from well-credentialed forensic scientists that their forensic science disciplines do indeed rest on a solid foundation, that precedent supports admission, and that the technique at issue easily meets the *Daubert* standard. What is a conscientious trial judge to do?

Judges and lawyers are expected to play an active role in evaluating scientific evidence. For centuries, common law judges and lawyers have valued the art of cross-examination as an essential safeguard of accuracy and completeness in witness testimony.<sup>38</sup> However, due to the complexity and need for applying scientific principles in order to evaluate the methodology of experts, judges and lawyers cannot simply “hand off” scientific evidence to the jury to evaluate despite this traditional role of cross-examining experts within the adversarial process. Somehow, trial judges need to acquire the requisite tools and knowledge to assess the reliability of the methods used by forensic scientists and other experts.<sup>39</sup> To do so, they need assistance. The Federal Rules of Evidence provide a wonderful, underutilized vehicle for obtaining such assistance.

F.R.E. 706 and similarly drafted state rules provide state and federal judges with the authority to enlist the assistance of court-appointed scientific experts to provide assistance and advice on scientific and

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<sup>37</sup> Tresa Baldas, *Defense Counsel View Report as New Weapon*, NAT’L L. J., May 11, 2009, <http://www.nationallawjournal.com/id=1202430604696/Defense-Counsel-View-Report-as-New-Weapon>; see also NAS REPORT, *supra* note 24, at 14.

<sup>38</sup> Deborah Gander, *Prescription For Powerful Expert Testimony*, TRIAL, May 2007, at 40 (“Lawyers rely heavily on expert testimony to provide powerful, convincing evidence. Whether you’re getting ready to put your medical expert on the stand or cross-examine the defense expert witness, proper preparation will help you make the most of the moment.”); RALPH ADAM FINE, *DIRECT AND CROSS-EXAMINATION OF EXPERT WITNESSES TO WIN* (2005), *adapted from* RALPH ADAM FINE, *THE HOW-TO-WIN TRIAL MANUAL* (3d rev. ed. 2005) (“Wigmore called cross-examination the “great engine” for getting at the truth. And so it is. It is a powerful tool because the witness understands that the jury is answering the questions before he or she answers.”).

<sup>39</sup> State and federal trial judges in *Daubert* jurisdictions have guidance for assessing the reliability of proffered expert testimony by subjecting the testimony to the following non-exclusive, non-dispositive *Daubert* checklist: “(1) whether the expert’s technique or theory can be or has been tested—that is, whether the expert’s theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.” FED. R. EVID. 702 advisory committee’s note.



technical matters. F.R.E. 706, coupled with F.R.E. 702, allows judges to utilize their gatekeeping ability to the fullest extent. Oddly, many judges are unaware that appointing experts would be helpful because they lack judicial experience with such appointments, believe the power to appoint experts applies in very limited circumstances,<sup>40</sup> or think that the benefits in appointing an expert are outweighed by whatever costs might accrue from doing so.<sup>41</sup>

F.R.E. 706 is one of the most important and underutilized rules in the evidence code. Trial judges cannot count on experts, hand-selected and paid for by the interested parties in a lawsuit, to answer all of the queries about challenged scientific evidence in a neutral manner. A better solution, and one that is widely used in European countries and elsewhere, is one in which trial judges are actively encouraged to appoint neutral experts who are less likely to be tempted to skew their testimony towards one side or the other.<sup>42</sup>

#### FEATURES OF F.R.E. 706

F.R.E. 706 permits the court *sua sponte*, or upon the parties' motion, to enter a ruling to show cause regarding why an expert witness should not be court-appointed.<sup>43</sup> The court may ask the parties for candidates and appoint the expert the parties have agreed upon or alternatively, the court can choose to select its own expert.<sup>44</sup> An important aspect of this appointment process is that the expert has consented to such an appointment by the court and, by extension, so have the parties,<sup>45</sup> although ultimately, F.R.E. 706 "vests exclusive authority with the court to control the expert-selection

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<sup>40</sup> JOE S. CECIL & THOMAS E. WILLGING, FED. JUDICIAL CTR., COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706, at 20 (1993).

<sup>41</sup> *Id.* at 19–23, 80, 89.

<sup>42</sup> See Tom Decaigny, *Inquisitorial and Adversarial Expert Examinations in the Case Law of the European Court of Human Rights*, 5 NEW J. EUR. CRIM. L. 2, 152–66 (2014); see also Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L. J. 1983, 2005–06 (1999); Anthony Champagne et al., *Are court-appointed experts the solution to the problems of expert testimony?*, 84 JUDICATURE 178, 180 n.9 (2001) ("The use of court-appointed experts is regularly used throughout Europe and other inquisitorial based legal jurisdictions throughout the world.").

<sup>43</sup> FED. R. EVID. 706(a).

<sup>44</sup> *Id.*

<sup>45</sup> CECIL & WILLGING, *supra* note 40, at 67 n.155 ("We also found that judges who appoint experts tend to support the adversarial system and carve out exceptions for court appointments only by obtaining the consent of the parties or by relying on the courts' traditional *parens patriae* to protect the interests of minors or wards of the state.").

process.”<sup>46</sup>

The expert must advise the parties of all findings the expert makes, the expert may be deposed by any party, the expert may be called to testify by the court or any party, and the expert may be cross-examined by any party, including the party that called the expert.<sup>47</sup> The court-appointed expert is permitted to receive reasonable compensation authorized by the court.<sup>48</sup> Experts in both criminal and civil cases may receive joint compensation under the Fifth Amendment, as well as in any other civil cases “by the parties in the proportion and at the time that the court directs . . . . [T]he compensation is then charged like other costs.”<sup>49</sup> The court may exercise its authority to notify the jury that the court appointed an expert.<sup>50</sup> Moreover, F.R.E. 706 does not prevent the parties from calling their own experts.<sup>51</sup>

The Advisory Committee (Committee) at the time of F.R.E. 706’s adoption intended this rule to address the pressing concern of expert shopping—specifically, the perception of experts as hired guns and the hesitancy of experts to be a part of a contentious case in court.<sup>52</sup> Although the Committee acknowledged that court-appointed experts “acquire an aura of infallibility to which they are not entitled . . .,” the Committee cited to an increasing trend of using experts as provided in F.R.E. 706.<sup>53</sup> The Committee viewed the mere “possibility that the judge may appoint an expert in a given case [as] a sobering effect on the expert witness of a party and upon the person utilizing his services.”<sup>54</sup> The Committee also recognized that trial judges have the inherent power to appoint experts of their own choosing.<sup>55</sup>

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<sup>46</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993) (“Rule 706 allows the court in its discretion to procure the assistance of an expert of its own choosing.”); John P. McCahey & Jonathan M. Proman, *Federal Rule of Evidence 706: Court-Appointed Experts*, SECTION OF LITIGATION, TRIAL EVIDENCE, AMERICAN BAR ASSOCIATION (Jun. 30, 2011), <http://apps.americanbar.org/litigation/committees/trialevidence/articles/summer2011-rule-706-court-appointed-experts.html>; see also FED. R. EVID. 706(a).

<sup>47</sup> FED. R. EVID. 706(b).

<sup>48</sup> FED. R. EVID. 706(c).

<sup>49</sup> FED. R. EVID. 706(c)(2).

<sup>50</sup> FED. R. EVID. 706(d).

<sup>51</sup> FED. R. EVID. 706(e) (noting that this rule does not prevent a party from calling its own expert witness).

<sup>52</sup> FED. R. EVID. 706 advisory committee’s note.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*; see also John M. Sink, *The Unused Power of a Federal Judge to Call His Own Expert Witnesses*, 29 S. CAL. L. REV. 195 (1956).

## CHALLENGES EXPERTS POSE IN THE ADVERSARIAL SYSTEM

F.R.E. 706 is a particularly important evidentiary rule in the United States and can make “potentially important inroads into the adversarial system . . . .”<sup>56</sup> The United States adversarial legal system runs into a significant roadblock when proffered evidence is beyond the ken of the average judge or juror.<sup>57</sup> Rather than seeking the “best” experts, the United States adversarial legal system implicitly encourages parties to seek experts whose views fall at the extreme ends of the scientific continuum on any given issue. The end result is that in many cases, inexperienced judges and factfinders hear two very different sides of a complex scientific matter and are left to resolve a dispute that, apparently, the scientific community itself has not resolved.<sup>58</sup>

Unfortunately, this situation can arise even when a particular scientific issue is resolved to the satisfaction of the broader scientific community, but there are a few available experts for hire “who still have reservations on the matter.”<sup>59</sup> Indeed, the adversarial nature of the United States legal system has been imputed for pulling in scientists from opposite ends of the spectrum.<sup>60</sup> Even where opposing experts are not accused of being charlatans or liars, experts are frequently accused of being little more than hired guns who tilt their certainties and uncertainties in the direction favored by the side that hired them.<sup>61</sup> This means that the value of the expert testimony cancels out, or the factfinder inadvertently places too much credence on the expert “whose forensic skills are the more enticing.”<sup>62</sup>

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<sup>56</sup> Richard A. Posner, *What is Obviously Wrong with the Federal Judiciary, Yet Eminently Curable*, 19 GREEN BAG 2D 187, 192 (2016); see also CECIL & WILLGING, *supra* note 40, at 94–95.

<sup>57</sup> Posner, *supra* note 56, at 190 (“A big problem with jury trials is that often they involve technological or commercial issues that few jurors understand (not many judges understand either) and that the lawyers and witnesses are unable or unwilling to dumb down to a level that the jurors would understand.”).

<sup>58</sup> NAS REPORT, *supra* note 24; see also HANDBOOK OF SCIENCE AND TECHNOLOGY STUDIES 506–26 (Sheila Jasanoff, Gerald E. Markle, James C. Petersen & Trevor Pinch eds., rev. ed. 1995).

<sup>59</sup> Susan Haack, *Of Truth, in Science and in Law*, 73 BROOK. L. REV. 985, 1002 (2008).

<sup>60</sup> *Id.*

<sup>61</sup> Memorandum from John Blume, Cornell Law School, An Overview of Significant Findings From the Capital Jury Project and Other Empirical Studies of the Death Penalty Relevant to Jury Selection, Presentation of Evidence and Jury Instructions in Capital Cases, Cornell Law School, at 35 (2008), <http://www.learningace.com/doc/1830081/bd00c614e08e48aa367ae5dda404a424/empirical-studies-summaries-revised-spring-2010>.

<sup>62</sup> John H. Langbein, *The German Advantage in Civil Procedure*, 54 U. CHI L. REV. 823, 836 (1985). See generally John H. Langbein, *Historical Foundations of the Law of Evidence*:

## SENTIMENT FOR NEUTRAL EXPERTS

Although F.R.E. 706 is infrequently used by trial judges, sentiment in favor of neutral experts is strong among legal scholars and “giants” such as U.S. Supreme Court Justice Stephen Breyer. Justice Breyer noted that in order for us to “build legal foundations that are sound in science as well as the law . . . .”<sup>63</sup> Professor David Faigman of University of California, Hastings College of the Law, who co-authored the treatise “Modern Scientific Evidence,” argues that “[h]aving an expert from the field to discuss the complexities of the science greatly should improve judges’ comprehension of the research and relieve their fears of making a holding or writing an opinion that delves deeply into the subject.”<sup>64</sup> Faigman suggests that the judiciary could benefit from the example provided by administrative agencies, which routinely use and rely on scientific advisory boards and related forms of institutionalized technical support.<sup>65</sup> Likewise, Professor Sheila Jasanoff in *Science at the Bar* argues for a variety of incremental relief methods to assist the court, such as the use of court-appointed experts to improve the United States legal system’s ability to handle the increasing use of science and technology expert testimony in courtrooms.<sup>66</sup> Judge Richard A. Posner of the Seventh Circuit Court of Appeals has also published a piece in favor of increased use of court-appointed “neutral” experts.<sup>67</sup> Tahirih V. Lee, Associate Professor at Florida State University College of Law, contends that neutral experts are viewed as “less susceptible to pressure . . . to tailor their testimony to support a particular legal outcome than are partisan experts whose fees are paid by parties with a vested interest in the legal outcome.”<sup>68</sup>

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*A View from the Ryder Sources*, 96 COLUM. L. REV. 1168 (1996).

<sup>63</sup> See, e.g., Champagne et al., *supra* note 42, at 179 n.6 (citing to a variety of scholars arguing in favor of court-appointed experts); Zhu hao Wang, *An Alternative to the Adversarial: Studies on Challenges of Court-appointed Experts*, 2 J. FORENSIC SCI. MED. 28, 32 (2016).

<sup>64</sup> David L. Faigman, *The Law’s Scientific Revolution: Reflections and Ruminations on the Law’s Use of Experts in Year Seven of the Revolution*, 57 WASH. & LEE L. REV. 661, 668–69 (2000).

<sup>65</sup> DAVID L. FAIGMAN, *LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE IN THE LAW* 200 (1999).

<sup>66</sup> SHEILA JASANOFF, *SCIENCE AT THE BAR: LAW, SCIENCE, AND TECHNOLOGY IN AMERICA* 221–22 (1995).

<sup>67</sup> Posner, *supra* note 57, at 190.

<sup>68</sup> Tahirih V. Lee, *Court Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence*, 6 YALE L. & POL’Y REV. 480, 493 (1988).

## VALIDATION FROM THE COURTS

Support for trial judges appointing experts has come from the highest levels of our appellate court process, including the Supreme Court. In his concurring opinion in *General Electric Co. v. Joiner*, Justice Breyer noted that while judges are expected as gatekeepers to make sure “‘all scientific testimony and evidence admitted is not only relevant, but reliable’ . . . . [J]udges are not scientists and do not have the scientific training that can facilitate the making of such decisions.”<sup>69</sup> Because a lack of expertise does not excuse judges from their gatekeeper responsibilities, Justice Breyer referred to “techniques” such as Federal Rule of Civil Procedure Rule 16’s pre-trial conference authority and the ability to appoint special masters and hire specially trained law clerks as means to assist judges in the selection of impartial expert assistance to the courts.<sup>70</sup> Justice Breyer discussed relevant portions of F.R.E. 706 and referenced a well-known treatise writer and federal judge, Judge Jack Weinstein of the Eastern District of New York, who asserts that “a court should sometimes ‘go beyond the experts proffered by the parties’ and ‘utilize its powers to appoint independent experts under Rule 706 . . . .’”<sup>71</sup>

Federal appellate court judges have long recognized the value of court-appointed experts by remanding cases to trial judges with instructions to appoint neutral experts.<sup>72</sup> For example, in *Eastern Air Lines v. McDonnell Douglas Corp.*,<sup>73</sup> the experts for each party had divergent views.<sup>74</sup> The Fifth Circuit noted that the jury could benefit from the testimony of a neutral expert due to “[t]he unusual difficulty of estimating a major airline’s lost profits resulting from extensive delays stretching over a period of three years and involving 90 jet aircraft . . . .”<sup>75</sup> The court discussed the objectivity of a court-appointed expert: “[b]ecause a court-appointed

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<sup>69</sup> *General Electric Co. v. Joiner*, 522 U.S. 136, 147–48 (1997) (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993)) (“This requirement will sometimes ask judges to make subtle and sophisticated determinations about scientific methodology and its relation to the conclusions an expert witness seeks to offer—particularly when a case arises in an area where the science itself is tentative or uncertain, or where testimony about general risk levels in human beings or animals is offered to prove individual causation.”) (Breyer, J., concurring).

<sup>70</sup> *Id.* at 149 (citing *CECIL & WILLING*, *supra* note 40, at 783–88).

<sup>71</sup> *Joiner*, 522 U.S. at 150 (quoting J. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 116 (1995)).

<sup>72</sup> *Champagne et al.*, *supra* note 42, at 179 (noting that there has been a call for court-appointed experts for at least a century).

<sup>73</sup> 532 F. 2d 957 (5th Cir. 1976).

<sup>74</sup> *Id.* at 965.

<sup>75</sup> *Id.* at 1000.

witness could be unconcerned with either promoting or attacking a particular estimate of Eastern's damages, he could provide an objective insight into the \$24.5 million difference of opinion between the parties' experts."<sup>76</sup> The Fifth Circuit further stated that "the mere presence of a neutral expert may have, in Judge Prettyman's words, 'a great tranquilizing effect on the experts retained by Eastern and McDonnell.'"<sup>77</sup>

In *Walker v. American Home Shield Long Term Disability Plan*,<sup>78</sup> the Ninth Circuit found that the trial court was within its discretion to appoint a medical expert *sua sponte* under F.R.E. 706(a).<sup>79</sup> Although counsel argued that the court's additional evidence was not necessary, the circuit court recognized the trial court's need to select an expert when evaluating evidence on a difficult to define disease with unknown origins.<sup>80</sup> The appellate court viewed this case as presenting the trial court judge with the "appropriate occasion" to appoint an independent expert to assist him in evaluating contradictory evidence because the court found the contradictory evidence concerning fibromyalgia "confusing and conflicting."<sup>81</sup>

Forensic science appears to be an area that would benefit from greater use of court-appointed experts due to the specialized nature of the procedures used as well as the controversy that now surrounds even the most venerable of the forensic areas (e.g., fingerprints).<sup>82</sup> Although such appointments are rare, it is worth noting that the district court judge in *Genentech, Inc. v. Boehringer Mannheim*<sup>83</sup> carefully acknowledged the valuable use of court-appointed experts who provided her with "excellent tutorials" to assist her in understanding basic molecular genetics and recombinant DNA technology.<sup>84</sup>

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.* (quoting Proceedings of the Seminar on Protracted Cases for United States Circuit and District Judges, 21 F.R.D. 395, 469 (1957)).

<sup>78</sup> 180 F.3d 1065 (9th Cir. 1999).

<sup>79</sup> *Walker*, 180 F.3d at 1071.

<sup>80</sup> *Id.* at 1071.

<sup>81</sup> *Id.*

<sup>82</sup> Ralph Norman Haber & Lynn Haber, *Experimental Results of Fingerprint Comparison Validity and Reliability: A Review and Critical Analysis*, 54 SCI & JUST. 375, 384–86 (2014) (arguing that studies on the accuracy and reliability of fingerprint analysis are inapplicable to fingerprint casework).

<sup>83</sup> 47 F. Supp. 2d 91 (1999).

<sup>84</sup> *Id.* at 94.

## CONCLUSION

Judges and lawyers need not become scholars in every area of science and technology in order to argue and rule on motions involving scientific evidence issues. Instead they must become “sophisticated consumers of science” who are capable of understanding the core issues related to disputed evidence.<sup>85</sup> Toward this end, gatekeeping judges who must ultimately decide the admissibility of disputed scientific and technical evidence under F.R.E. 702 need expert assistance. F.R.E. 706 provides that assistance in the form of authority to appoint neutral experts. Europeans have long valued the important role that court-appointed experts play in their judicial process to the point that they disfavor a court process considered adversarial in nature with hired gun experts.<sup>86</sup> By appointing experts to assist in understanding scientific evidence like European nations, United States judges—both federal and state—can improve the public’s confidence in the independence of our judiciary. The increased use of court-appointed experts will move the United States adversarial legal system closer to its goal of providing an objective, impartial forum to litigants while promoting the integrity and independence of the judiciary, which is priceless.

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<sup>85</sup> FAIGMAN, *supra* note 65, at 88.

<sup>86</sup> See, e.g., C. Stavrianos, C. Papadopoulos, L. Vasiliadis, A. Pantazis & A. Kokkas, *The Role of Expert Witness in the Adversarial English and Welsh Legal System*, 5 RES. J. MED. SCI. 4, 5–6 (2011); Langbein, *The German Advantage in Civil Procedure*, *supra* note 62, at 823 (arguing Germany’s tradition of making extensive use of court-appointed rather than party-retained experts shows the advantages of these practices); see also EUROPEAN COMM’N FOR THE EFFICIENCY OF JUSTICE (CEPEJ), GUIDELINES ON THE ROLE OF COURT-APPOINTED EXPERTS IN JUDICIAL PROCEEDINGS OF COUNCIL OF EUROPE’S MEMBER STATES 14 (2014), [https://wcd.coe.int/ViewDoc.jsp?p=&id=2278707&Site=&direct=true#P187\\_15373](https://wcd.coe.int/ViewDoc.jsp?p=&id=2278707&Site=&direct=true#P187_15373) (discussing the appointment criteria for experts in sections 3.1–3.3); Champagne et al., *supra* note 42, at 180 n.9 (“The use of court-appointed experts is regularly used throughout Europe and other inquisitorial based legal jurisdictions throughout the world.”).